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MICHAEL RODAK, JR.

No. 75-1787

In the Supreme Court of the United States

OCTOBER TERM, 1976

PAUL JOHN SMOKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Petitioner contends that the search warrant that led to the seizure of crucial evidence against him was invalid because (1) it failed to comply with the requirements of Rule 41, Fed. R. Crim. P., and (2) the affidavit upon which it was based was insufficient to support a finding of probable cause.

After a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to fifteen years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and fined $5,000. The court of appeals affirmed (Pet. App. 16-21).

The cocaine (together with other evidence) was seized at petitioner's residence pursuant to a search warrant issued by a state district judge at the request of a federal agent. The warrant was directed to "the sheriff or any peace officer" of the county (Pet. App. 26). The agent's affidavit (Pet. App. 23-25)—which alleged a probable violation of federal law (Pet. App. 25)—was based primarily upon the agent's personal surveillance of the activities of a vendor of cocaine to an undercover local police officer. The agent's observations revealed that petitioner's house was the source of the cocaine.[1] The affidavit also stated that a confidential informant had personally observed cocaine in the house within the previous 24 hours. The warrant was executed immediately by federal agents and local officers acting jointly, and a return was made to the court of the issuing judge (see Pet. App. 17-18).

1. Petitioner argues that the warrant failed to conform to Rule 41 requirements because it did not specifically authorize a nighttime entry, did not require execution within ten days, was directed to a state rather than a federal officer, and was not returned to a federal magistrate.

There was no need for the warrant to authorize a nighttime entry, since, as the court of appeals stated (Pet.

[1]The agent averred that, within the previous four hours, two individuals had met with the undercover officer and transferred to him an ounce of cocaine for the price of $2,000. The men had then discussed the transfer of eight ounces of cocaine, with the understanding that the transactions "would take place one ounce at a time." One of the individuals then left to procure a second ounce of cocaine. The agent followed him to petitioner's residence, where he remained for a brief period. The individual then returned to the undercover officer by a circuitous route and provided him with a second ounce of cocaine in return for $2,000 (Pet. App. 23-24).

App. 18), it "was executed before 10:00 p.m. which is the end of 'daytime' under Rule 41(h)." The other variances from the Rule's requirements, as the court of appeals correctly held, "concerned * * * form rather than substance" (Pet. App. 17) and did not result in any prejudice to petitioner (Pet. App. 18). Thus, while the warrant did not specify that he search must be conducted within ten days, it was obvious from the circumstances that the agents intended to carry out the search promptly, and in fact the warrant was executed almost immediately upon its issuance.

The requirement that warrants for federal searches be directed to federal officers is intended to "insur[e] some measure of control in purely federal matters to federal officers." *United States* v. *Townsend*, 394 F. Supp. 736, 750 (E.D. Mich.). Here, control by federal officers was in fact maintained since, despite the formal language of the warrant, they participated with local officers in the search. Moreover, the federal and local officers were working together pursuant to a program established by Executive Order; the local officers were therefore persons "authorized by the President" to "assist in enforcing any law" of the United States within the meaning of Rule 41(c). See *United States* v. *Harrington*, 504 F. 2d 130, 134 (C.A. 7).

The defect, if any, in making the return to the issuing judge rather than to a federal magistrate was ministerial and did not effect the validity of the search. *United States* v. *Wilson*, 451 F. 2d 209, 214 (C.A. 5), certiorari denied *sub nom. Fairman* v. *United States*, 405 U.S. 1032; *United States* v. *Harrington*, *supra*, 504 F. 2d at 134; see also *United States* v. *Sturgeon*, 501 F. 2d 1270, 1275 (C.A. 8), certiorari denied, 419 U.S. 1071.

In sum, under either the test of *Harrington, United States* v. *Sellers*, 483 F. 2d 37, 44 (C.A. 5) and *Sturgeon*, 501 F. 2d at 1275—*i.e.*, whether the Rule 41 provision violated "is a technical one which blueprints the procedure for the issuance of federal warrants" rather than one "designed to protect the integrity of the federal courts or assure reasonableness on the part of federal law enforcement officers"—or the test of *United States* v. *Burke*, 517 F. 2d 377, 386-387 (C.A. 2)—*i.e.*, whether "there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed or * * * there is evidence of intentional and deliberate disregard of a provision in the Rule"—no showing was made here requiring application of the exclusionary rule.

2. Petitioner argues that the affidavit was insufficient because it did not set forth facts adequately justifying the conclusion that the informant was credible. The test for the sufficiency of an affidavit, however, is whether it "demonstrates the existence of probable cause" (*United States* v. *Ventresca*, 380 U.S. 102, 109) by detailing "facts or circumstances" (*Nathanson* v. *United States*, 290 U.S. 41, 47) that provide a "sufficient basis upon which a finding of probable cause could be made" (*Giordenello* v. *United States*, 357 U.S. 480, 486). Here, the agent's own observations (see note 1, *supra*) provided sufficient facts and circumstances, without reference to the informant's tip, to demonstrate the existence of probable cause. This is not a case like *Aguilar* v. *Texas*, 378 U.S. 108, where the affidavit was based entirely upon an informant's tip (see 378 U.S. at 109), or *Spinelli* v. *United States*, 393 U.S. 410, where the tip was "a necessary element" (see 393 U.S. at 415) without which "probable cause could not be established" (*id.* at 414).

Moreover, *Aguilar* requires no more than an *alternate* showing that the informant "was 'credible' *or* his information 'reliable' " (378 U.S. at 114; emphasis added). In contrast to *Spinelli*—where the informant's tip was a simple conclusory statement (see 393 U.S. at 414) that failed to detail "the manner in which the information was gathered" (*id.* at 416) and where the surveillance offered as corroboration reflected "only innocent-seeming activity and data" (*id.* at 413-414) containing "no suggestion of criminal conduct when taken by themselves" (*id.* at 418)—the reliability of the informant's tip here was supported both by the fact that the informant purported to relate what he had personally observed and by the agent's own observations, which, taken together with information supplied by the undercover police officer (see note 1, *supra*), "clearly established probable cause to believe that unlawfully possessed cocaine would be found upon a search of [petitioner's] premises" (Pet. App. 18-19).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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